STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2003
v	No. 235009 Oakland Circuit Court
CLAY GREGORY LEAYM, Defendant-Appellant.	LC No. 00-171977-FH

Before: Markey, P.J., and Cavanagh and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by jury of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(ii) (sexual contact with a relation).[1] The trial court sentenced defendant to five years' probation with the first year to be served in the county jail. We affirm.

This case arises from allegations from two complainants, both of whom are defendant's sisters-in-law, concerning defendant's conduct in the summer of 1997. The complainant who was thirteen years old at that time[2] testified that she would go to defendant's house two or three times each week with her sisters and would baby-sit defendant's children and spend the night. According to this complainant, one night when she was pretending to be asleep on the couch in the living room with defendant's two- or three-year-old daughter, defendant rubbed up and down the blanket covering her, rubbing from her chest down to her "private area" for approximately five minutes. She testified that she did not see him while he touched her, but that she felt the sensation and then saw him in the room. The complainant who was sixteen years old during the summer of 1997 testified that she, too, would baby-sit two or three times per week for defendant's children and spend the night. She testified that more than once defendant touched her lower "privates" under her nightgown, but over her underwear, when she was sleeping at night. She testified that she would wake up and see defendant walk away, but that she did not actually see him touching her and she thought she may have been dreaming. These incidents

[1] The jury acquitted defendant on the charged count of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b) (incapacitated victim).

[2] This complainant is actually the half-sister of defendant's wife and the half-sister of the other complainant; the other complainant is a full sister of defendant's wife.

were not reported to authorities until November 1999. Defendant testified that he never touched either of the complainants inappropriately.

On appeal, defendant first argues that the combined effect of numerous instances of prosecutorial misconduct denied him a fair trial. We disagree. Generally, we review de novo allegations of prosecutorial misconduct, but we review for clear error the trial court's factual findings. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

> Prosecutorial misconduct issues are decided case by case and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. [*People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000) (citations omitted).]

"No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.* Otherwise improper comments may not require reversal if the prosecutor made the comments in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). The trial court's instruction to the jury that it is to decide the case on the evidence alone and that the arguments of attorneys are not evidence may dispel any unfair prejudice caused by the prosecutor's comments. See *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

First, defendant claims that the prosecutor engaged in misconduct by attempting to impeach defendant with his no contest plea that was withdrawn. According to defendant, the prosecutor improperly suggested to the jury that defendant had wavered from his claim of innocence by attempting to bring out the fact that defendant initially had pleaded no contest to the allegations.

The record reveals that on May 4, 2000, defendant pleaded no contest to the charges against him, including one count of second-degree criminal sexual conduct and one count of fourth-degree criminal sexual conduct, pursuant to a *Cobbs*[3] agreement. The understanding was that the minimum sentence would be one year in jail. However, on the sentencing date, it became apparent that the actual sentencing guidelines range for defendant was higher than the trial court initially understood it to be when defendant pleaded no contest. As a result, defendant withdrew the no-contest plea and the matter proceeded to trial.

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[3] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

On appeal, defendant takes issue with the prosecutor's questioning of him concerning what occurred on May 4.[4] Defense counsel promptly objected, and after a short bench conference, the trial court excused the jury. After a discussion between both counsel and the trial court, the prosecutor withdrew her question and the trial court indicated that it would not permit this line of questioning. The trial court declined to give defense counsel's requested curative instruction and later in the proceedings declined defense counsel's renewed request for a curative instruction.

The prosecutor's attempt to use defendant's no-contest plea that was withdrawn to impeach defendant was improper. See MRE 410(2); *People v Street*, 288 Mich 406, 408-409; 284 NW 926 (1939); *People v George*, 69 Mich App 403, 405; 245 NW2d 65 (1976) (evidence concerning a vacated guilty plea is inadmissible whether the vacated plea is introduced as substantive evidence of the defendant's guilt, or only as impeaching evidence when the defendant testifies); *People v Trombley*, 67 Mich App 88, 92-93; 240 NW2d 279 (1976). However, the prosecutor's reference to May 4 in her question to defendant did not place before the jury the fact of defendant's no-contest plea. Rather, defendant's timely objection resulted in the cessation of this line of questioning, and thus evidence of the no-contest plea was not placed before the jury. Moreover, we believe that any prejudice that may have arisen from this line of questioning was cured by the trial court's instructions to the jury. Before the jury began to deliberate, the trial court instructed that the attorneys' questions to witnesses are not evidence. Moreover, after the jury was sworn but before testimony began, the trial court had instructed the jury that "the questions of the attorneys do not provide evidence; it is the answers to the questions that provide evidence." Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); see *Green, supra*. Under these circumstances, defendant is entitled to no relief.

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[4] The following exchange occurred between the prosecutor and defendant:

> *Q*. And [defense counsel] asked you whether you consistently maintained your innocence; correct?
>
> *A*. Yes, I do.
>
> *Q*. And you told him that from day one you maintained your innocence and you never wavered from that; correct?
>
> *A*. That's correct.
>
> *Q*. Do you remember May 4th of last year?
>
> *A*. Yes.
>
> *Q*. Do you remember what you said May 4th of last year?
>
> *A*. Not, not exactly, no.

Defendant also claims that the prosecutor engaged in misconduct by commenting on investigative procedures used in criminal cases, although these procedures were not part of the evidence, and thus suggesting that that proper investigative procedures were followed in the instant case and that the charges against defendant would not have been filed unless the allegations against him were true. Because defendant failed to object to the challenged comments at trial, we review this claim for outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Watson, supra*. Even if outcome-determinative plain error exists, "an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Schutte, supra* at 719, quoting *Carines, supra* at 763 (citations omitted).

Having reviewed the challenged comments in context, we find no plain error requiring reversal. The prosecutor's comments that defendant challenges as improper were made in the prosecutor's rebuttal to defense counsel's closing argument. In his closing argument, defense counsel spoke about the difficulty of defending oneself from accusations, commenting that his wife had asked him how he could defend himself if he gave his babysitter a ride home one night and she later said that he had touched her during the drive. Defense counsel also referred to the police interviewing and questioning defendant. In her rebuttal, the prosecutor stated that there were investigative procedures that are followed before a case is filed. It is apparent that the prosecutor, in response to defense counsel's argument, wanted to establish that a mere accusation by a babysitter does not necessarily result in one being charged with a crime and forced to defend oneself before a jury. Even if the challenged comments were improper, they were made in response to defense counsel's argument, *Kennebrew, supra*, and the trial court's instructed the jury that arguments of counsel are not evidence, *Green, supra*. Under these circumstances, we find that any potential unfair prejudice was dispelled.

Defendant next claims that the prosecutor engaged in a multitude of other miscellaneous misconduct, listing six alleged instances of misconduct. However, defendant merely cites to the record where the comments were made, but does not analyze each alleged instance separately with citation to law. Thus, defendant effectively has abandoned these issues on appeal. *Watson, supra* at 587. Nonetheless, having reviewed each alleged incident of prosecutorial misconduct, we note that these issues are without merit because either no prosecutorial misconduct was involved or because any prejudice was remedied by the trial court's instructions to the jury.

In sum, we believe that the prosecutor's conduct, whether considering the alleged misconduct separately or in total, did not rise to a level requiring reversal. We conclude that defendant was not denied a fair and impartial trial. *Watson, supra*. Defendant was entitled to a fair trial, not a perfect trial. *People v Abraham*, __ Mich App __, __; __ NW2d __ (Docket No. 227938, rel'd April 10, 2003).

Defendant next argues that the trial court violated his due process right to present a defense because it effectively barred defendant from impeaching the younger complainant with evidence of a prior inconsistent statement. This claim arises from the following circumstances.

During cross-examination of the younger complainant, defendant attempted to impeach her trial testimony with, among other things, the statement that she gave to a police officer. At

trial, the complainant testified that the unwanted touching occurred once, but maybe twice, over a three to five year period, but a police report indicated that the unwanted touching occurred at least 200 times over a three-year period. On redirect examination, when the prosecutor asked the complainant to explain what she meant when she said it happened 200 times, defendant objected on the grounds of relevancy. After a short bench conference between the court and counsel, the testimony elicited spoke of the 200 times in terms of "everything" that happened, including other things that made her feel uncomfortable, not just the unwanted touching.

The crux of this issue is that defendant sought to call the officer to testify concerning what the complainant had told him, but the trial court ruled that if he did so, that would "open the door" to allowing testimony concerning the conduct that "everything" included, which defendant had sought to keep out of evidence as irrelevant. In other words, the trial court ruled that were defendant to call the officer to further explore the complainant's statement, the court would allow the prosecutor the opportunity to elicit testimony from the complainant to fully explain what she meant. Defense counsel spoke with the officer and, on the basis of the trial court's ruling, decided not to call the officer. Defendant now contends that "the prior inconsistent statement of [the complainant] should have been admitted without opening the door to other alleged acts" and, in essence, the failure to allow this admission denied him the right to present a defense.

We find defendant's argument without merit. Defendant's analysis focuses on his assertion that he laid the proper foundation for the testimony, but he provides no law to support his conclusion that he should have been allowed to offer the officer's testimony to contradict the complainant's testimony without opening the door to other alleged acts. Thus, defendant effectively has abandoned this issue. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (a party may not "simply ... announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position"); *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999) ("[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned."). Moreover, to the extent that defendant's argument implicates the trial court's decision to allow the indicated rebuttal evidence, the trial court did not abuse its discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). "Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *Id*. at 399 (citation omitted). Here, defendant sought to withhold a complete explanation of the "200 times" from the jury, but to still use that statement to impeach the complainant. As the trial court said, "you can't have your cake and eat it too." Further, defendant otherwise had the opportunity to impeach the complainant without the testimony of the officer, and used the police report and the preliminary examination testimony, among other things, to do so. Defendant is entitled to no relief.

Defendant also argues that the trial court violated his due process right to present a defense because it precluded defendant from investigating a false bomb threat called in by the younger complainant. Defendant claims that because the trial court barred him from investigating the false bomb threat that occurred in May 1999, he could not discover whether she made false allegations against defendant in November 1999 in an effort to attract sympathy or positive attention or to offset negative attention received from the false bomb threat.

Contrary to defendant's argument, the record reveals that defendant was not precluded from investigating the false bomb threat, but rather another matter, and that he had access to information about the complainant's juvenile conviction concerning the threat. Further, during cross-examination, defendant elicited an admission from the younger complainant that she had pleaded guilty to calling in a false bomb threat. MRE 609. Defendant does not argue that the trial court abused its discretion in limiting defendant to the use of one question with respect to the bomb threat. On the record before us and in light of defendant's argument on appeal, we find no merit in defendant's claim of error.

Defendant also argues that he was denied a fair trial because the trial court refused to allow him to exercise a peremptory challenge of a black female juror. The facts relative to this issue are as follows. Shortly before jury selection commenced, the trial court announced to the parties that there would be "no peremptory challenges of any minority unless you approach the bench." During jury selection, but without first approaching the bench, defendant asked to excuse a minority juror. The trial court called counsel to the bench and held an off-the-record conference. Afterward, the trial court, without explanation, denied defendant's peremptory challenge. After the jury was selected and sworn and had left the courtroom, the trial court made the following record in support of its denial:

> *The Court.* First of all, the [c]ourt will state the –[defense counsel] wanted to excuse the juror that was seated, I believe, in Seat Number 4, who was a minority. I said beforehand no preempts on any minority unless you approach the bench. That did not occur. When he approached the bench, it was because he said the lady smiled at the prosecutor. The [c]ourt noticed that she was smiling at everyone, including the bench and including towards the defendant. I do not find that reason. I find it prejudicial. And I will not excuse her.

The trial court further noted that the prosecutor made objections to defense counsel's use of defendant's peremptory challenges because it appeared to her that defense counsel was attempting to avoid any women on the jury. The trial court indicated that "I do find that there was a pattern in connection with that" and that it would "take that up at the end of this trial." After the trial court finished it remarks, defense counsel sought to make a record concerning defendant's peremptory challenge to minority juror.

> [*Defense Counsel*]. [T]he juror that I did ask to have removed when you asked me to approach was an African-American female.
>
> *The Court.* She was.
>
> [*Defense Counsel*]. There were two African-American females on the panel.
>
> *The Court*. I know that.
>
> [*Defense Counsel*]. She never, at one time, that I noticed, smiled at the defendant nor at me. She –
>
> *The Court.* The [c]ourt observed her. She's a very smiling person. The [c]ourt stated that opinion on the record. She was still a minority. I told you before you

exercise any perempt on a minority – I do not consider smiling to be any grounds whatsoever.

On the basis of this record, defendant argues that the trial court erred in denying his peremptory challenge. Accordingly, both parties analyze this issue in the context of what is commonly referred to as a *Batson*[5] challenge.[6]

A *Batson* challenge involves a three-step process for evaluating whether a party improperly used a peremptory challenge to remove a minority juror.[7] The steps are "(1) the complaining litigant must make a prima facie showing of discrimination, (2) the burden then shifts to the party exercising the peremptory challenge to articulate a race-neutral rationale for striking the juror at issue, and then (3) the court must determine whether the complaining litigant carried the burden of proving 'purposeful discrimination.'" *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 319; 553 NW2d 377 (1996). This Court "is to give great deference to the trial court's findings on this issue because they turn in large part on credibility." *Id.* at 319-320. We review a trial court's *Batson* ruling for an abuse of discretion. *Id.* at 320.

At issue in the present case is only the second step, i.e., whether defendant could show a race-neutral and gender-neutral explanation for its challenge of a minority juror. Defendant claimed that the minority juror smiled at the prosecutor but not at defendant or defendant's counsel. The trial court rejected that explanation because from its observations the juror smiled at everyone. From the record, we assume that the trial court's grounds for denying the peremptory challenge was the failure of defendant to state a credible, non-pretextual race-neutral

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[5] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

[6] We note that meaningful analysis of this issue is made difficult by what we perceive to be a fundamental flaw in the procedure dictated by the trial court. At the outset of jury selection, the trial court ordered that before *any* motion to excuse a minority peremptorily, counsel must approach the bench. No explanation for this directive appears in the record. Because the procedure that the trial court imposed placed the onus on the party requesting to excuse a juror, we believe that the trial court was operating under the premise that all minority peremptory challenges must be defended by stating a race-neutral basis. The law does not require such proof for every peremptory challenge to a minority juror. Peremptory challenges are an important tool for ensuring a fair trial. *People v Schmitz*, 231 Mich App 521, 528; 586 NW2d 766 (1998). A party's request to exercise a peremptory challenge can be denied only after a determination has been made that a peremptory challenge has been used for an impermissible purpose consistent with *Batson* and its progeny. That procedure involves a three-step process. *Harville v State Plumbing & Heating*, 218 Mich App 302, 319; 553 NW2d 377 (1996). The first step requires the party opposing the challenge to make a prima facie showing of a discriminatory purpose. *Id.* From the record before us, it appears that the trial court completely omitted this step. Because the trial court did not follow the accepted procedure, basic facts such as the race of defendant, the race of the complainants and any explanation regarding prejudice that would result from the juror being excused are not known to us. However, because defendant did not object to the trial court's procedure or raise it as an issue on appeal, the procedure itself is not before us.

[7] Peremptory challenges may be neither race-based nor gender-based. *Batson, supra* at 89; *J E B v Alabama ex rel TB*, 511 US 127, 129, 144-145; 114 S Ct 1419; 128 L Ed 2d 89 (1994) ("We hold that gender, like race, is an unconstitutional proxy for juror competence and impartiality.").

and gender-neutral reason for the challenge. Giving great deference to the trial court's findings, we conclude that the trial court did not abuse its discretion by, in essence, finding that defendant's proffered explanation was not credible.

Finally, defendant maintains that he was denied the right to meaningful questioning of the jury venire because the trial court conducted the voir dire. Specifically, defendant claims that although he was allowed to suggest questions that the trial court would use during voir dire, no opportunity was provided for meaningful follow-up questioning. We disagree. We review a trial court's handling of voir dire for abuse of discretion. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). If the trial court conducts voir dire, it must adequately question jurors regarding potential bias so that challenges for cause, and peremptory challenges, can be intelligently exercised. *Id.*

From our review of the record, we do not find support for defendant's claim. On a number of occasions, the trial court permitted follow-up questions suggested by the parties. Moreover, defendant cites no examples where follow-up questions were requested but denied.

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra